

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK**

PAUL B. DAVIS.,

Plaintiff,

vs.

CORY ARCANGEL, and DOES 1-10,

Defendants.

Civil Action No. 1:21-cv-03663-ENV-VMS

**ANSWER AND AFFIRMATIVE  
DEFENSES TO COUNTERCLAIMS**

Plaintiff, Paul B. Davis (“Plaintiff” or “Davis”), by and through his attorneys, Mazzola Lindstrom LLP, responds to the Counterclaims of Defendant Cory Arcangel (“Defendant” or “Arcangel”), as follows:

To the extent not specifically admitted herein, Plaintiff denies all allegations in Defendant’s Counterclaims, including all allegations contained therein that are not specifically set forth in the numbered paragraphs of the Counterclaims.

**THE PARTIES**

1. Davis admits that, to the best of his knowledge, Arcangel resides in Brooklyn, New York, and Stavanger, Norway. Except as specifically admitted, Davis denies the allegations of paragraph 1 of Arcangel’s Counterclaims.

2. Davis admits the allegations of paragraph 2 of Arcangel’s Counterclaims.

**JURISDICTION AND VENUE**

3. Davis admits the allegations of paragraph 3 of Arcangel’s Counterclaims, but denies that Arcangel is entitled to any damages against Davis.

4. Davis neither admits nor denies the allegations of paragraph 4 of Arcangel’s Counterclaims, which consist of legal conclusions as to which no responsive pleading is required.

5. Davis admits that venue is proper in the Eastern District of New York. Except as specifically admitted, Davis denies the allegations of paragraph 5 of Arcangel's Counterclaims.

### **BACKGROUND**

6. Davis admits that the Beige Programming Ensemble started in or about 1999, as an outgrowth of Beige Records, which was founded in or about 1997 by Davis and subsequently joined by Arcangel, while Davis and Arcangel were students at the Oberlin Conservatory of Music. Except as specifically admitted, Davis denies the allegations of paragraph 6 of Arcangel's Counterclaims.

7. Davis denies the allegations of paragraph 7 of Arcangel's Counterclaims.

8. Davis denies the allegations of paragraph 8 of Arcangel's Counterclaims.

9. Davis denies the allegations of paragraph 9 of Arcangel's Counterclaims.

10. Davis admits the allegations of paragraph 10 of Arcangel's Counterclaims.

11. Davis denies the allegations of paragraph 11 of Arcangel's Counterclaims.

12. Davis denies the allegations of paragraph 12 of Arcangel's Counterclaims.

13. Davis denies the allegations of paragraph 13 of Arcangel's Counterclaims.

14. Davis admits that between approximately 2002 and 2010 the Beige Records website, [www.beigerecords.com](http://www.beigerecords.com), contained a link to a sub-page for Arcangel, as a member of Beige. Davis lacks knowledge or information sufficient to admit or deny the remaining allegations of paragraph 14 of Arcangel's Counterclaims, and therefore denies the same.

15. Davis admits that, in or about 2010, he became aware that, without prior notice or authorization from the administrators of the Beige Records website, Arcangel had modified several pages of the Beige Records website to direct visitors to another website(s) and/or webpage(s), and modified several administrative settings of the Beige Records website/server. Except as

specifically admitted, Davis lacks knowledge or information sufficient to admit or deny the remaining allegations of paragraph 15 of Arcangel's Counterclaims, and therefore denies the same.

16. Davis denies the allegations of paragraph 16 of Arcangel's Counterclaims.

17. Davis admits that in or about 2010 he, with the agreement and approval of the two other active members of Beige at that time, created the "About Us" page on the Beige Records website to accurately reflect that: (1) works on which the active members of Beige collaborated while Arcangel was an active member, were designated/credited under Beige name and rubric, as Davis, Arcangel, and the other Beige members had previously agreed; and (2) notwithstanding the Beige group's/members' collaborations and contributions, at some point those works incorrectly and inappropriately began appearing as solely the work of/credited to Arcangel. Except as expressly admitted, Davis denies the allegations of paragraph 17 of Arcangel's Counterclaims.

18. Davis admits that in or about 2020, the site hosting for the archival Beige Records website, [www.beigerecords.com](http://www.beigerecords.com), was moved from icdsoft.com to Amazon Web Services, which to the best of Davis' knowledge, information and belief, does not have redirect functionality, and includes only static archival content. Except as specifically admitted, Davis denies the allegations of paragraph 18 of Arcangel's Counterclaims.

19. Davis admits that Arcangel wrote and included language acknowledging Davis' contributions in the "narrative" regarding *Super Mario Clouds* that Arcangel posted by at least 2003 on the "Cory Arcangel" sub-page of the Beige Records website, which was unchanged for at least 2003, 2004 and into December 2005, as shown in archived versions of the narrative captured by third-party website [www.archive.org](http://www.archive.org). See, e.g., <https://web.archive.org/web/20030418093944/http://www.beigerecords.com/cory/21c/21c.html>, <https://web.archive.org/web/20041204174909/beigerecords.com/cory/21c/21c.html>,

<https://web.archive.org/web/20051202084603/beigerecords.com/cory/21c/21c.html>. Davis

further admits that it appears that the [www.archive.org](http://www.archive.org) page for which a link is found at footnote 3 of Arcangel's Counterclaims, is an archived version of the "narrative" regarding *Super Mario Clouds* that Arcangel wrote and included on the "Cory Arcangel" sub-page of the Beige Records website from 2003-2005. Except as specifically admitted, Davis denies the allegations of paragraph 19 of Arcangel's Counterclaims.

20. Davis admits that the 2003 New York Times article that is referenced and excerpted at paragraph 20 of Arcangel's Counterclaims credited Beige as the author of *Super Mario Clouds*, consistent with Arcangel's representation to the article's author that, "BEIGE started as a record label [Beige Records USA] in 1997 and as we started to display our media/installation work we adopted the name 'BEIGE programming ensemble', now in 2002 we simply refer to everything we do [performances, media art, events] as BEIGE.," and that Arcangel's message to the author included a link to *Super Mario Clouds*, although the article included a photo of a computer cartridge labeled "Super Mario Clouds 2002" credited to "Cory Arcangel/Beige." Except as specifically admitted, Davis denies the allegations of paragraph 20 of Arcangel's Counterclaims.

21. Davis admits that in or about 2010 he removed a photo credit for "Cory Arcangel/Beige" from an excerpt from the 2003 New York Times article which credited Beige as the author of *Super Mario Clouds*, consistent with Arcangel's representation to the article's author that, "BEIGE started as a record label [Beige Records USA] in 1997 and as we started to display our media/installation work we adopted the name 'BEIGE programming ensemble', now in 2002 we simply refer to everything we do [performances, media art, events] as BEIGE.," and Arcangel's inclusion of a link to *Super Mario Clouds* in his message to the author, and that Arcangel never

objected to this modification. Except as specifically admitted, Davis denies the allegations of paragraph 21 of Arcangel's Counterclaims.

22. Davis denies the allegations of paragraph 22 of Arcangel's Counterclaims.

23. Davis admits that in or about September 2021, he received a message from Arcangel incorrectly and falsely accusing Davis of creating and/or operating an unauthorized and/or incorrect website under Arcangel's name; and of offering Arcangel products for sale without authorization. Davis further admits that, because Arcangel's assertions were untrue and incorrect, and because he did not want to be bullied or manipulated by Arcangel, he did not respond to Arcangel's unfounded assertions. Except as expressly admitted, Davis denies the allegations of paragraph 23 of Arcangel's Counterclaims.

24. Davis admits that from time to time Arcangel may have included images, videos and/or recordings of his work on a sub-page(s) on the Beige Records website, the archived version of which is now hosted by Amazon Web Services. Except as specifically admitted, Davis denies the allegations of paragraph 24 of Arcangel's Counterclaims.

25. Davis lacks knowledge and information sufficient to admit or deny the allegations of paragraph 25 of Arcangel's Counterclaims, and on that basis denies the same.

26. Davis admits that from time to time Arcangel may have included images, videos and/or recordings of his work on a sub-page(s) on the Beige Records website, the archived version of which is now hosted by Amazon Web Services. Except as specifically admitted, Davis denies the allegations of paragraph 26 of Arcangel's Counterclaims.

27. Davis denies the allegations of paragraph 27 of Arcangel's Counterclaims.

28. Davis denies the allegations of paragraph 28 of Arcangel's Counterclaims.

29. Davis denies the allegations of paragraph 29 of Arcangel's Counterclaims

## **FIRST COUNTERCLAIM**

### **(Copyright Infringement)**

30. Davis repeats and incorporates by reference his responses to paragraphs 1 through 29 of Arcangel's Counterclaims.

31. Davis lacks knowledge and information sufficient to admit or deny the allegations of paragraph 31 of Arcangel's Counterclaims, and on that basis denies the same.

32. Davis lacks knowledge and information sufficient to admit or deny the allegations of paragraph 32 of Arcangel's Counterclaims, and on that basis denies the same.

33. Davis lacks knowledge and information sufficient to admit or deny the allegations of paragraph 33 of Arcangel's Counterclaims, and on that basis denies the same.

34. Davis denies the allegations of paragraph 34 of Arcangel's Counterclaims.

35. Davis denies the allegations of paragraph 35 of Arcangel's Counterclaims.

36. Davis denies the allegations of paragraph 36 of Arcangel's Counterclaims.

37. Davis denies the allegations of paragraph 37 of Arcangel's Counterclaims.

38. Davis denies the allegations of paragraph 38 of Arcangel's Counterclaims.

39. Davis denies the allegations of paragraph 39 of Arcangel's Counterclaims.

40. Davis denies the allegations of paragraph 40 of Arcangel's Counterclaims.

41. Davis denies the allegations of paragraph 41 of Arcangel's Counterclaims.

42. Davis denies the allegations of paragraph 42 of Arcangel's Counterclaims.

43. Davis denies the allegations of paragraph 43 of Arcangel's Counterclaims.

**SECOND COUNTERCLAIM**

**(Accounting)**

44. Davis repeats and incorporates by reference his responses to paragraphs 1 through 43 of Arcangel's Counterclaims.

45. Davis denies the allegations of paragraph 45 of Arcangel's Counterclaims.

**THIRD COUNTERCLAIM**

**(Unjust Enrichment)**

46. Davis repeats and incorporates by reference his responses to paragraphs 1 through 45 of Arcangel's Counterclaims.

47. Davis denies the allegations of paragraph 47 of Arcangel's Counterclaims.

48. Davis denies the allegations of paragraph 48 of Arcangel's Counterclaims.

49. Davis denies the allegations of paragraph 49 of Arcangel's Counterclaims.

50. Davis denies the allegations of paragraph 50 of Arcangel's Counterclaims.

**FOURTH COUNTERCLAIM**

**(Deceptive Acts and Practice Under N.Y. Gen. Bus. Law §349)**

51. Davis repeats and incorporates by reference his responses to paragraphs 1 through 50 of Arcangel's Counterclaims.

52. Davis lacks knowledge and information sufficient to admit or deny the allegations of paragraph 52 of Arcangel's Counterclaims, and on that basis denies the same.

53. Davis lacks knowledge and information sufficient to admit or deny the allegations of paragraph 53 of Arcangel's Counterclaims, and on that basis denies the same.

54. Davis denies the allegations of paragraph 54 of Arcangel's Counterclaims.

55. Davis denies the allegations of paragraph 55 of Arcangel's Counterclaims.

56. Davis denies the allegations of paragraph 56 of Arcangel's Counterclaims.

57. Davis denies the allegations of paragraph 57 of Arcangel's Counterclaims.

**FIFTH COUNTERCLAIM**

**(Violation of Rights to Privacy and Publicity Under N.Y. Civil Rights Law §51)**

58. Davis repeats and incorporates by reference his responses to paragraphs 1 through 57 of Arcangel's Counterclaims.

59. Davis denies the allegations of paragraph 59 of Arcangel's Counterclaims.

60. Davis denies the allegations of paragraph 60 of Arcangel's Counterclaims.

61. Davis denies the allegations of paragraph 61 of Arcangel's Counterclaims.

62. Davis denies the allegations of paragraph 62 of Arcangel's Counterclaims.

63. Davis denies that Arcangel is entitled to exemplary damages, or any damages at all.

Except as specifically admitted, Davis denies the allegations of paragraph 63 of Arcangel's Counterclaims.

64. The allegations of paragraph 64 of the Arcangel's Counterclaims consist of legal conclusions as to which no responsive pleading is required. To the extent a responsive pleading is required, Davis denies the allegations of paragraph 64 of Arcangel's Counterclaims.

65. Davis denies the allegations of paragraph 65 of Arcangel's Counterclaims.

66. The allegations of paragraph 66 of the Arcangel's Counterclaims consist of legal conclusions as to which no responsive pleading is required. To the extent a responsive pleading is required, Davis denies the allegations of paragraph 66 of Arcangel's Counterclaims.



## **AFFIRMATIVE DEFENSES**

### **FIRST AFFIRMATIVE DEFENSE**

#### **(Failure to State a Claim on Which Relief May be Granted)**

1. Arcangel's Counterclaims, and each of them, fail to state a claim against Davis upon which relief may be granted.

### **SECOND AFFIRMATIVE DEFENSE**

#### **(Other Cause/Fault of Others)**

2. The loss and damages alleged in Arcangel's Counterclaims, if any, were proximately caused by Arcangel, and/or by other third parties who had possession of or access to Arcangel's alleged works and/or webpages, and over whom Davis had no control, and for whose acts and/or omissions Davis is not responsible or liable.

### **THIRD AFFIRMATIVE DEFENSE**

#### **(Failure to Mitigate Damages)**

3. Arcangel is barred from recovery, in whole or in part, of any damages claimed because he did not exercise due care and did not act reasonably to protect himself from, or mitigate against, any purported damage, and his failure was the proximate cause of his damages, if any.

### **FOURTH AFFIRMATIVE DEFENSE**

#### **(Comparative Negligence)**

4. If and to the extent that Arcangel has sustained any damages, these purported damages were caused, in whole or in part, by Arcangel's own negligence or intentional conduct.

**FIFTH AFFIRMATIVE DEFENSE**

**(Uncertainty of Pleading)**

5. Arcangel's Counterclaims are barred, in whole or in part, because all causes of action alleged in the Counterclaims are uncertain in that they fail to apprise Davis as to what acts or omissions are the subject of Arcangel's Counterclaims and the specific nature of Davis' alleged wrongdoing. Lacking certainty, Arcangel's Counterclaims must be dismissed.

**SIXTH AFFIRMATIVE DEFENSE**

**(Proximate Cause)**

6. If and to the extent Arcangel has sustained any damages, these damages were not proximately caused by any conduct of Davis, as alleged or otherwise.

**SEVENTH AFFIRMATIVE DEFENSE**

**(Waiver)**

7. Arcangel's Counterclaims are barred in whole or in part because Arcangel has waived his rights to relief, if any.

**EIGHTH AFFIRMATIVE DEFENSE**

**(Estoppel)**

8. Arcangel's Counterclaims are barred in whole or in part because Arcangel is estopped by his acts or omissions from maintaining claims against Davis.

**NINTH AFFIRMATIVE DEFENSE**

**(Unclean Hands)**

9. Arcangel's Counterclaims are barred in whole or in part because Arcangel, through his actions or actions of his agents, has unclean hands.

**TENTH AFFIRMATIVE DEFENSE**

**(Statute of Limitations/Laches)**

10. Arcangel's Counterclaims are barred in whole or in part because Arcangel's claims are untimely under the applicable statutes of limitations and/or are barred by the doctrine of laches, because Arcangel unjustifiably delayed, to Davis' prejudice, in bringing suit and/or in seeking the relief sought.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(Acquiescence/Consent)**

11. Arcangel's Counterclaims are barred in whole or in part because Arcangel by his own conduct or the conduct of his agents has acquiesced in and/or consented to the conduct alleged.

**TWELFTH AFFIRMATIVE DEFENSE**

**(Release)**

12. Arcangel's Counterclaims are barred in whole or in part because Arcangel by his own conduct or the conduct of his agents has released Davis from any claims asserted.

**THIRTEENTH AFFIRMATIVE DEFENSE**

**(Good Faith)**

13. Arcangel's Counterclaims are barred in whole or in part because to the extent Davis engaged in any act alleged by Arcangel, he did so innocently and in good faith.

**FOURTEENTH AFFIRMATIVE DEFENSE**

**(No Damages)**

14. Arcangel's Counterclaims are barred in whole or in part because Arcangel has suffered no damages as a result of any alleged act or omission by Davis, or at all.

**FIFTEENTH AFFIRMATIVE DEFENSE**

**(Adequate Remedy at Law)**

15. Arcangel's claims for injunctive and equitable relief are barred because there is an adequate remedy at law.

**SIXTEENTH AFFIRMATIVE DEFENSE**

**(Preemption)**

16. Arcangel's Counterclaims are preempted by federal statutory and regulatory law regarding copyrights, including but not limited to 17 U.S.C. §101 et seq., and/or barred by the Supremacy Clause of the United States Constitution, principles of federalism, and general preemption because the relief sought impermissibly conflicts with and frustrates the purposes of federal statutory and regulatory authority.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

**(Speculative Damages)**

17. Arcangel's Counterclaims are barred, in whole or in part, because the damages sought are too speculative and remote.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

**(Spoliation of Evidence)**

18. Upon information and belief, critical evidence related to Arcangel's Counterclaims was destroyed, altered, concealed and/or spoliated by Arcangel and/or his agents.

**NINETEENTH AFFIRMATIVE DEFENSE**

**(Additional Affirmative Defenses)**

19. Davis reserves the right to supplement the foregoing and to raise any additional affirmative defenses as may appear during the progress of this case to the fullest extent allowed

under the controlling applicable law.

WHEREFORE, Davis respectfully requests that this Court enter an order granting judgment in favor of Davis, and grant such other and further relief in Davis' favor as the Court deems just and proper.

Dated: January 31, 2022

**MAZZOLA LINDSTROM LLP**

By: /s/ Wendy J. Lindstrom  
Wendy J. Lindstrom  
Stephen L. Brodsky  
1350 Avenue of the Americas, 2<sup>nd</sup> Floor  
New York New York 10019  
P: 646.216.8300  
[wendy@mazzolalindstrom.com](mailto:wendy@mazzolalindstrom.com)  
[stephen@mazzolalindstrom.com](mailto:stephen@mazzolalindstrom.com)

Laura D. Castner  
1999 Avenue of the Stars, Suite 1100  
Los Angeles, CA 90067  
P: 310.694.8585  
[laura@mazzolalindstrom.com](mailto:laura@mazzolalindstrom.com)

*Attorneys for Plaintiff Paul B. Davis*